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No. 92-1956

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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SUPPLEMENTAL BRIEF OF PETITIONER

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DESIGNATION OF CORPORATE RELATIONSHIPS

The Designation of Corporate Relationships set forth at pages ii-iii of petitioner's petition for a writ of certiorari as supplemented by page i of petitioner's reply brief is currently accurate and is incorporated by reference herein.

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SUPPLEMENTAL BRIEF OF PETITIONER

In the short period of time that has passed since August 3, 1993, when Consolidated Rail Corporation ("Conrail") filed its reply brief in support of its joint petition for a writ of cetiorari in these two cases, the Court of Appeals for the Second Circuit has spoken for the first time with respect to the circumstances under which a cause of action for negligent infliction of emotional distress may be maintained pursuant to the Federal Employers' Liability Act ("FELA"). *See Puthe v. Exxon Shipping Co.*, No. 92-9291, 1993 U.S. App. LEXIS 20996 (2d Cir. Aug. 19, 1993). We submit this supplemental brief to call this Court's attention to this recent decision. The

decision both supplements Conrail's argument at pages 11-19 of its petition that the courts of appeals are badly splintered with respect to the circumstances under which a plaintiff may recover for the negligent infliction of emotional distress pursuant to the FELA and demonstrates that even in the short period of time in which Conrail's petition has been pending before this Court, the courts of appeals have continued to struggle with the issues raised in these two cases.

Significantly, the Court of Appeals for the Second Circuit in *Puthe* did not adopt the expansive test formulated in these cases by the Court of Appeals for the Third Circuit that foreseeability is the only restraint on recovery for emotional distress pursuant to the FELA. *See* Conrail's Petition at 10-11. Instead, it rejected the approach of the courts of appeals for the fourth and sixth circuits that a plaintiff must demonstrate "outrageous conduct," *see Elliott v. Norfolk & W. Ry. Co.*, 910 F.2d 1224, 1229 (4th Cir. 1990), or "unconscionable abuse," *see Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539-40 (6th Cir. 1990), to recover for the negligent infliction of emotional distress pursuant to the FELA, and declined to set any standard for the type of injury or misconduct necessary to present a claim pursuant to the FELA. It concluded that "whatever the standards for such a claim may be, a plaintiff cannot recover under any theory of negligence unless his injuries are foreseeable." *Puthe*, 1993 U.S. App. LEXIS at *11.

The Court of Appeals for the Second Circuit concluded that the defendant could not have foreseen that the plaintiff would suffer from emotional distress as a result of stresses (such as laboring under adverse weather

conditions, learning of the death of a fellow crewmember, and witnessing the injury of another fellow crewmember) caused by his job as an able-bodied seaman because the defendant had "no duty to keep [the plaintiff] safe from the rigors of a job as a seaman." *Puthe*, 1992 U.S. App. LEXIS at *12. This approach stands in stark contrast to that of the Court of Appeals for the Third Circuit which in these cases concluded that it was foreseeable that the ordinary stresses of plaintiffs' jobs as a railroad laborer and train dispatcher could cause emotional injury. *See* Conrail's Petition at 21.

CONCLUSION

For the foregoing reasons and for the reasons set forth in its petition for certiorari and reply brief, petitioner Consolidated Rail Corporation respectfully requests that this Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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